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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 903.

WALTER SEIDMAN,
Petitioner,

v.

ANNE HAMILTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS OF RESPONDENT'S BRIEF

	PAGE
Counter Statement of Question Involved	1
Counter History of the Case	2
Argument	5
Conclusion	9

TABLE OF CASES CITED

Berger v. City of Phila., 8 F. R. D. 39	6
Brown v. Fennell, U. S. D. C., E. D. of Pa., 155 F. Supp. 424	7
Gilbert v. David, 235 U. S. 561, 35 S. Ct. 164	8
Guarantee Trust Co. v. Collins, 76 Fed. 2d 870 (3rd Cir. C., 1935)	6
Jennings v. Fanti, 96 F. Supp. 264	6
Mansfield C. & L. M. Ry. Co. v. Swan, 1884, 111 U. S. 379, 4 S. Ct. 510	5
Mitchell v. Maurer, 1934, 293 U. S. 237, 55 Sup. Ct. 162, 79 L. Ed. 338	5
Mitchell v. U. S., 21 Wall. 350, 88 U. S. 350	6
McLarty v. Borough of Ramsey, U. S. D. C. of N. J., 1958, 166 F. Supp. 291, 296	5
Paulder v. Paulder, 185 Fed. 2d 901	6
Smith v. Sperling, 354 U. S. 91, 93 n. 1 (1957)	7
Thompson v. Gaskill, 315 U. S. 442, 446 (1942)	6

PAGE

Underwood v. Maloney, 256 Fed. 2d 334, 340 (3rd Cir. C. 1958) 5

Zellem v. Herring, 97 F. Supp. 103 U. S. D. C., W. D. of Pa. (1951) 6

RULE CITED

Federal Rule of Civil Procedure 12h, 28 U. S. C. A. 5

AUTHORITY CITED

Restatement of the Law of Conflicts of Laws, Sec. 29 .. 6
Sec. 15 6

COUNTER STATEMENT OF QUESTION INVOLVED.

1. May the United States District Court, upon consideration of the defendant's deposition and oral testimony in open court relating to the issue of diversity jurisdiction, dismiss the action because of lack of diversity jurisdiction without submitting the issue of diversity jurisdiction to the jury?

COUNTER HISTORY OF THE CASE.

This action for personal injuries arises out of an automobile accident which occurred on October 28, 1955 in suburban Philadelphia, Pennsylvania. At the time of the collision the investigating police officers ascribed to the defendant the address Box 265, 120 Wells Avenue, Newark, Delaware. This address was obtained from an old driver's license of the State of Delaware.

The plaintiff in his Complaint identified the defendant as being a resident of the State of Delaware.

There is no showing of any attempt to obtain any other address for the defendant, although there was ample time for investigation between the date of accident, October 28, 1955, and the filing of the plaintiff's Complaint, April 24, 1956. Any reasonable investigation attempts by the plaintiff would have clearly disclosed that the defendant was at time of accident and at the time the Complaint was filed a citizen of the State of Pennsylvania. There clearly is no evidence of or any allegation that the defendant in any way sought to conceal or misrepresent in any manner her citizenship at any times pertinent to the matter at hand.

The plaintiff filed his Complaint in the United States District Court for the Eastern District of Pennsylvania on April 24, 1956. Service was made by the United States Marshal upon Secretary of the Commonwealth of Pennsylvania as is the procedure provided for in cases involving foreign residents. The defendant filed her Answer on December 28, 1956 to the Complaint denying the existence of diversity of citizenship of the parties, and averred clearly that the defendant was a resident of the State of Pennsylvania. The first inquiry concerning the defendant's citizenship was made by the plaintiff at a deposition of the defendant taken on December 30, 1958, some two years after the defendant filed her Answer denying that she was a resident of Delaware. On December 10, 1958 a pre-trial

conference was held at which time the defendant again asserted the defense of lack of diversity and consequent jurisdiction. Subsequently, the defendant filed a Motion to Dismiss for want of jurisdiction. It is the ruling of Judge Clary of United States District Court, Eastern District of Pennsylvania, in favor of the defendant on the jurisdictional question that gives rise to the plaintiff's appeal.

The facts touching upon the question of the defendant's citizenship were developed by way of deposition of the defendant and upon Court hearing before Judge Clary, May 6, 1959, at which the defendant testified on the question of citizenship and was examined thereon by the Court and counsel for the plaintiff.

That testimony developed the following: defendant was born in Philadelphia, Pennsylvania, moved to Newark, Delaware, with her parents, in 1927. She returned to Philadelphia where she attended the University of Pennsylvania, 1941-1943. Upon completion of her studies at the University she found employment and lived in Philadelphia, Pennsylvania. In October of 1951 she married a Pennsylvania citizen and resided in Philadelphia with him until June of 1952 when the couple moved to Jenkintown, Pennsylvania where they lived in a house belonging to the husband. The defendant's husband died in November, 1954, and she continued living at the Jenkintown address, and sometime later purchased the house from her husband's estate. Following the death of her husband, certain real estate agents called the defendant widow concerning the possibility of her desiring to sell her home. She testified that she became harassed by the pressures of these real estate men and quoted an exorbitant price which she felt certain that she could not obtain, but had no serious idea of selling (41a). She voted in Pennsylvania up until 1955; after 1957, because of her failing to vote for two successive years, her name was removed from the voting lists, although she had attempted unsuccessfully to secure an absentee ballot while travelling abroad in 1956.

The defendant remained in and about the Philadelphia area following the death of her husband until around Christmas of 1955 when, for the first time subsequent to her husband's death, she went to the State of Delaware for approximately three days to visit with her folks. In March of 1956 she commenced extensive travel abroad remaining out of the United States until August of 1956. In September of 1956 she again travelled abroad, returning to the United States in January of 1957. In September of 1956 before leaving, she gave the key to her house to a real estate broker friend named Connor. The purpose of her giving the key to Connor, according to the defendant, was to enable Connor to look after the house during her absence (34a-36a). From the time she moved into her home with her husband in 1952, until April 3, 1958 at which time she sold her home, she had in her employ a maid named Mamie Matthews who had a room in her house, and took care of all the household duties, even during the periods when the defendant travelled abroad (13a-14a).

In March of 1958 Connor advised the defendant that he had an interested purchaser for her home. Defendant testified that there had been no serious prior negotiations with Connor concerning any sale other than her general facetious remarks she made to a number of brokers shortly following her husband's death. On May 3, 1958 the defendant sold her Jenkintown home and eventually settled in Maryland where she presently resides.

The defendant strenuously insisted that at no time prior to March, 1958 when Connor advised her of an offer to purchase her home, did she entertain any intention of living or residing at any place other than Pennsylvania. Until that date she planned to live the rest of her life in Jenkintown, Pennsylvania (37a), (23a). At the age of eight (8) years while living with her parents in Delaware, a bank account was opened for the defendant which laid dormant and inactive during the years of her marriage, which bank account the defendant presently maintains.

In light of the testimony disclosed by the depositions and the defendant's oral testimony to the Court, the lower Court entered its Order dated June 2, 1959 dismissing the plaintiff's suit for want of jurisdiction.

The plaintiff appealed the District Court's Order dismissing the action to the Third Circuit Court of Appeals. The matter was heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel and upon consideration it was ordered and adjudged by the Third Circuit Court of Appeals that the District Court's Order be affirmed.

ARGUMENT.

The evidence before the Court was sufficient to enable the Court to rule that the defendant was at all times pertinent to the jurisdictional question a resident of Pennsylvania. The Court properly did so without having to submit the jurisdictional question to a jury.

The question of jurisdiction is vital in all cases, and that question must and should be resolved by the Trial Court in order to preclude the likelihood of long or costly trials. Federal Rule of Civil Procedure 12h, 28 U. S. C. A. provides that upon suggestion of the parties or otherwise, the Court shall dismiss the action when jurisdiction is lacking. *McLarty v. Borough of Ramsey*, U. S. D. C. of N. J., 1958, 166 F. Supp. 291, 296.

In the case of *Underwood v. Maloney*, 256 F. 2nd 334, 340 (3rd Cir. C. 1958), Chief Justice Biggs stated, "It must be borne in mind that the issue of jurisdiction has always been and should be determined in limine by a trial Court, *Mitchell vs. Maurer*, 1934, 293 U. S. 237, 55 Sup. Ct. 162, 79 L. Ed. 338; *Mansfield C. & L. M. Ry. Co. vs. Swan*, 1884, 111 U. S. 379, 4 S. Ct. 510." The trial Court may determine

jurisdictional questions without reference to a jury. *Guarantee Trust Co. v. Collins*, 76 Fed. 2nd 870 (3rd Cir. C. 1935). The question of jurisdiction in diversity cases is to be strictly construed. *Thompson v. Gaskill*, 315 U. S. 442, 446 (1942).

There is no question under the facts of this case that the defendant was clearly a citizen of the State of Pennsylvania as of the time of her marriage in October, 1951, and that such status continued without question until the time of her husband's death in 1954. Domicile being then established in Pennsylvania is presumed to continue until it is shown to have been changed. *Berger v. City of Phila.*, 8 F. R. D. 39. Restatement of Law, Conflict of Laws, Sec. 29. To bring about a change of citizenship from one state to another, there must be residence in the new domicile and intention to remain there permanently or indefinitely, and both physical presence and animus manendi in the new location must concur. *Zellem v. Herring*, 97 F. Supp. 103 U. S. D. C., W. D. of Pa. (1951); *Paulder v. Paulder*, 185 Fed. 2nd 901. To constitute a change in domicile two things are indispensable: first residence in the new locality; and second the intention to remain there. The change cannot be made facto et animo. Both are necessary. Either without the other is insufficient. *Jennings v. Fanti*, 96 Fed. Supp. 264; *Mitchell v. U. S.*, 21 Wall. 350, 88 U. S. 350; *Restatement of Law, Conflict of Laws*, Sec. 15.

The evidence disclosed in this case it is submitted, clearly shows that the defendant remained a resident of the State of Pennsylvania until April 3, 1958, the date which she sold her home in Jenkintown and moved to her present location in Maryland. It was not until March of 1958 that she formed any intention of leaving Pennsylvania to take up residence elsewhere. The fact that she travelled abroad extensively following her husband's death, cannot be taken as an intention to give up her Pennsylvania citizenship. As a matter of fact she returned from these travels and again occupied her Jenkintown, Pennsylvania home continuously until she sold it in April of 1958.

The only evidence connecting the defendant with Delaware citizenship is the fact that she had in her possession at the time of accident her old Delaware driver's license from which the police obtained her old Delaware address. It is submitted that this modicum of evidence is completely over-shadowed and clearly controverted by the facts of her marriage to a Pennsylvania resident and continued residence in Pennsylvania until April of 1958.

In the case of *Brown v. Fennell*, U. S. D. C., E. D. of Pa., 155 Fed. Supp. 424, on facts not dissimilar, it was held that mere possession of a driver's license of the State of New Jersey by a Pennsylvania citizen was not evidence of citizenship or domicile in New Jersey sufficient to support diversity of jurisdiction. There, at time of accident the defendant was driving a car registered in New Jersey, and the address of his New Jersey operator's license was his school residence in New Jersey. At the time the Complaint was filed in that matter the defendant had returned to his family home in Pennsylvania. The Complaint alleged that the plaintiff was a citizen of Pennsylvania, and that the defendant was a citizen of New Jersey. Diversity of citizenship being the sole ground for jurisdiction. The defendant then moved for dismissal of the action on the grounds that the requisite diversity of citizenship was lacking inasmuch as both parties were domiciliaries of Pennsylvania. The Court in dismissing the case for want of jurisdiction stated, "While the New Jersey registration could have misled the plaintiff, it is clearly of little value to support the plaintiff's contention that the defendant was a New Jersey citizen."

The question of diversity is controlled by the status of citizenship of the parties at the time the suit is begun. *Smith vs. Sperling*, 354 U. S. 91, 93 n. 1 (1957); *Brown vs. Fennell*, Supra.

The Petitioner in this matter states that the Trial Court and the Court of Appeals recognized that the evidence was not so clear and unambiguous as to justify taking the ques-

tion of jurisdiction from the jury. A careful reading of both the District Court and Third Circuit Court of Appeals Opinions will show that both Courts are in complete agreement that the evidence in this case justified no other action than removal of the jurisdictional question from jury presentation.

The case of *Gilbert v. David*, 235 U. S. 561, 35 S. Ct. 164. this Court held that the issue of citizenship of the plaintiff in a suit brought in a Federal Court need not be submitted to the jury but may be disposed of by the Court upon the testimony introduced by the parties upon that question. It was also insisted in that case that the Court erred in itself considering the testimony and in not submitting the issue to the jury. The Court stated "but while the Court may have submitted the question to the jury it was not bound to do so, the parties having adduced their testimony pro and con, it was the privilege of the Court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon the subject." In this present case the Trial Court fully heard the pro and con arguments and weighed all of the evidence available on the subject and decided that the jurisdictional requirement had not been satisfied.

It is submitted that had this question been presented at trial the evidence would have adduced the same facts as were presented to the District Court by way of deposition and open hearing in Court of the defendant. Upon such the District Court would have been able to declare as a matter of law that jurisdiction was not satisfied. All that was done here by the District Court was to prevent a needless expenditure of the Court's time in having this case go on trial before jury and reach the only conclusion possible under the facts of this case.

CONCLUSIONS.

The uncontroverted facts here admit of no interpretation other than that at all times pertinent to the jurisdiction question the defendant and the plaintiff were both citizens of Pennsylvania, and that diversity jurisdiction was, therefore, lacking. Accordingly the United States District Court was proper in dismissing the action for want of jurisdiction. For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

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